United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1352

United States Court of Appeals
FOR THE SECOND CIRCUIT

SUSAN G. FURMAN, as Executrix of the Estate of Robert Jay Furman, deceased,

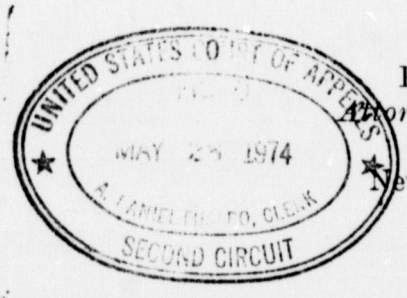
Plaintiff-Appellant,

against

OEA, INC.,

Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT



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Statement of Issue

Do the cumulative activities of defendant OEA, Inc. in New York, and its corporate and business contacts with New York when viewed as a whole, rather than separately and in isolation, require a determination that OEA was doing business in New York?

Statement of the Case and Relevant Facts

On April 23, 1971, the plaintiff's husband, Major Robert Jay Furman, was killed in the crash of a United States Air Force F-111 type aircraft which occurred in the vicinity of the Leach Gunnery Range, near Edwards Air Force Base, California. At the time of the subject crash, Major Furman was accompanied by another crew member, Major Hurt, who also died as a result of the accident. The representatives of Major Hurt commenced an action in California

against the identical defendants sued in the instant actions. Prior to and during the pendency of the instant litigation in New York, the Hurt action proceeded in California and all of the defendants therein including OEA have been found subject to jurisdiction in that State.

Originally, the plaintiff herein, Mrs. Furman, commenced an action against General Dynamics Corporation, the manufacturer of the aircraft, in the Supreme Court of the State of New York on January 11, 1973. On February 9, 1973, the defendant removed the action to the Southern District of New York, and thereafter, on February 13, 1973, the plaintiff filed an Amended Complaint joining McDonnell Douglas Corporation, the manufacturer of the crew escape module and cockpit ejection system for said aircraft. On March 29, 1973, based on additional information discovered by plaintiff's counsel, plaintiff instituted a separate action in the Southern District of New York against OEA, Inc., the manufacturer of the malfunctioning device in the crew ejection capsule's parachute release mechanism.

Several motions were made in the Southern District of New York by all parties in the related actions. General Dynamics and McDonnell moved to transfer the suit to California, where the Hurt litigation was pending, pursuant to 28 U.S.C. § 1404(a). OEA moved to dismiss the complaint on the theory that it was not "doing business" in New York and, therefore, was not subject to jurisdiction in this state (App. 8a). The plaintiff moved separately for consolidation of these two New York actions and also to strike a defense pleaded in the answers filed by General Dynamics and McDonnell that the action was time barred because California's one-year statute of limitations was applicable.

The District Court granted the motion to consolidate and transferred these suits to the Central District of California, but stayed the transfer pending renewal and determination of the OEA motion to dismiss and the plaintiff's motion to strike the defense of the statute of limita-

tions until such time as additional discovery on those issues had been concluded. On January 29, 1974, after oral argument on the renewed motions, the District Court granted both OEA's motion to dismiss and the plaintiff's motion to strike the defense of the California statute of limitations (App. 122a). Said order also provided for the immediate transfer of the plaintiff's action against General Dynamics and McDonnell Douglas to the United States District Court for the Central District of California (App. 134a). The plaintiff now appeals from the January 29, 1974 opinion and order of the District Court which dismissed the action against OEA. Plaintiff submits that OEA, Inc. is "doing business" in New York.

OEA was incorporated in Delaware and has its principal place of business in the State of Illinois (App. 10a). It is a corporation principally engaged in the design and manufacture of explosive and propellant devices used in personnel escape systems for military aircraft. In addition to its primary military defense product lines, OEA also manufactures component parts for use in commercial aircraft such as the Boeing 747 type aircraft. Mr. Ahmed Kafadar is Chairman of the Board and chief executive officer of OEA (App. 11a, 17a). Explosive Technology, Inc. ("E.T."), a California corporation and wholly owned subsidiary of OEA, also designs and manufactures products used in military aircraft personnel escape systems. Mr. Kafadar is also Chairman of the Board of E.T. (App. 20a). Like OEA, E.T. also produces products for non-military and commercial markets. Jetaxe is one such product which is manufactured by E.T. and sold to private demoltion companies and fire departments.

Both OEA and E.T. are currently represented in New York. In January, 1973, three months before OEA was sued in New York, OEA entered into an agreement with Cornhill Commercial Co. of New York City, appointing it sole representative for OEA's overseas markets (App.

119a). Similarly, E.T. has exclusive franchising agreements with two New York companies for the distribution of E.T.'s "jetaxe" product (App. 21a).

During the last four years OEA has shipped approximately $900,000 worth of its products to or through New York (App. 23a). Approximately $620,000 worth represents OEA manufactured bomb ejectors which though "sold" to Boeing Aircraft Corporation in Seattle, Washington, were shipped to the Plattsburgh Air Force Base in Plattsburgh, New York (App. 24a, 97a). The remaining shipments to New York include replacement parts for F-4 jet aircraft and 747 type aircraft. The F-4 parts are generally shipped to New York for shipment to foreign air forces. The 747 parts, generally procured by New York purchasing officers, are used both by domestic air carriers having bases in New York and in some instances the parts are forwarded to the foreign commercial air carrier's home base overseas (App. 24a).

In addition to OEA's substantial shipment of products into New York, E.T. also participates actively in defense contracting markets in New York. E.T. has sold and continues to sell its products to Grumman Aircraft Corporation, located in Bethpage, New York, pursuant to a contract to supply certain components for the F-14 project. To date, the value of E.T. sales to Grumman are in excess of one million dollars (App. 124a). As was mentioned earlier, E.T.'s product "jetaxe" is also sold in New York *via* the two New York based exclusive franchise dealerships which were arranged for by E.T. To date, jetaxe sales in New York amount to several thousand dollars (App. 124a).

Both OEA and E.T. personnel have made several trips to New York for the purpose of advancing their business in New York. E.T. personnel had made more than eighty (80) visits to New York during the period of time between November 1970 and March 1973 for the purpose of dis-

cussing and advancing E.T. sales commitments to the Grumman Aircraft Corporation (App. 115a). OEA personnel, in particular Mr. Kafadar, had made approximately nine visits to New York during the same period of time (App. 106a). Some OEA trips were for the purpose of discussing OEA submitted proposals and biddings on federal contracts, while others were for the purpose of debriefing potential customers such as Grumman Aircraft (App. 108a, 109a). At least one trip was for the purpose of meeting with American Stock Exchange personnel to complete the registration of OEA stock on that New York based exchange (App. 111a).

Since its acquisition in early 1971, the five man Board of Directors of E.T. has been dominated by OEA officers and directors. Moreover, OEA's fiscal control over E.T. is undisputed. E.T.'s financial status is not separately available, rather, it is incorporated in a consolidated report published by OEA (Record on Appeal, Doc. No. 26, at 17, 18). The corporate treasurer for E.T. is also an OEA personality. In addition to these official "earmarks" of OEA's corporate control of E.T., Mr. Kafadar has stated that his personal approval is necessary for any and all E.T. sales or contracts in excess of $100,000 (App. 51a). Thus, it is obvious that E.T.'s corporate autonomy is, to say the least, minimal. E.T. is nothing more than an incorporated division of OEA.

Plaintiff respectfully submits that the totality of the defendant's contacts with New York is substantial. The activities of OEA when done, as here, on a regular, systematic and continuous basis, clearly amount to corporate presence in New York. The District Court's failure to view OEA's acts in New York in light of the nature of OEA's business and as a totality was error and, therefore, its decision granting the defendant OEA's motion to dismiss should be reversed and the motion denied.

OEA's Contacts with New York are Substantial

Plaintiff respectfully submits that the totality of the in-state corporate activities of OEA, as well as through its subsidiary, Explosive Technology, Inc. and sales agent, Cornhill Commercial Co. of New York City, New York, were regular, continuous and systematic. Accordingly, corporate presence within this state was established and, therefore, *in personam* jurisdiction over the defendant exists by virtue of New York Civil Practice Law and Rules § 301. Thus, the decision below granting the defendant's motion to dismiss should be reversed and the motion denied.

This Court's recent decision in *Beja* v. *Jahangiri,* 453 F. 2d 959 (2d Cir. 1972), is particularly applicable to the question presented in the appeal at bar. Although the plaintiff relied significantly on the rationale in that case, the District Court decision makes no mention of the *Beja* case. In *Beja, supra,* the plaintiff sought to acquire jurisdiction over the non-resident defendant by application of the *Seider* v. *Roth* doctrine. The trial court vacated the attachment of the subject insurance policy holding that the writ was improperly issued because the insurance company was not "doing business" in New York. In reversing the trial court's decision in *Beja,* this Court noted that under New York law "doing business" has no well defined meaning. Relying on Judge Cardozo's celebrated decision in *Tauza* v. *Susquehanna Coal Co.,* 220 N.Y. 259 (1917), Circuit Judge Anderson quoted:

> "'[T]here is no precise test of the nature or extent of the business that must be done. All that is requisite is that the corporation is here.'" *Beja* v. *Jahangiri, Id.* at 961.

Developing that thought further, Judge Anderson wrote:

> "The New York Court of Appeals has, in general, taken a liberal view toward finding that foreign cor-

> porations are doing business within the state, and a number of its opinions have indicated that the 'doing business' standard is practically equivalent to the most permissible one that the Constitution will allow. Due process requires only that a foreign corporation 'have certain minimum contacts with [the state]' such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. The test is a qualitative, rather than quantitative one. It is of scant value to attempt to measure whether the corporation could have done 'a little more or a little less within the state. International Shoe Co. v. Washington, 326 U.S. 310, 316, 319, 66 S.Ct. 154, 158, 159, 90 L.Ed. 95 (1945). A number of New York Court of Appeals decisions imply that this test is synonymous with the dimensions of the New York 'doing business' test. (citations omitted)." *Id.* at 961.

The Court's approach in *Beja, supra,* was consistent with the well-settled policy in this Circuit of considering the "realities" and not the "formalities" to determine corporate presence for the purposes of establishing *in personam* jurisdiction over a foreign corporation. *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 175 F.2d 900, at 902-3 (2d Cir. 1949). In *Echeverry, supra,* it was noted that:

> "[T]he problem [of determining corporate presence] must be solved in light of commercial actuality, not in the aura of juristic semantics." *Id.* at 902, 903.

The opinion of the District Court in the case at bar did not display an appreciation of the totality of OEA's undisputed qualitative contacts with New York. Rather, the court below describes each of the many contacts individually and evaluated them on a piece-meal basis. Clearly, such an approach is overly restrictive and inconsistent with federal and state decisional law on the subject. *International Shoe Co.* v. *Washington, supra; Beja* v. *Jahangiri, supra;*

Scanapico v. *Richmond Fredericksburg & Potomac R. Co.*, 439 F.2d 17 (2d Cir. 1970), *aff'd en banc* 439 F.2d 25 (1970); *Gelfand* v. *Tanner Motor Tours Ltd.*, 385 F.2d 116 (2d Cir. 1967), cert. denied, 390 U.S. 996, 88 S.Ct. 1198 (1968); *Frummer* v. *Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 281 N.Y.S.2d 41 (1967); *Taca International Airlines, S.A.* v. *Rolls Royce of England, Ltd.*, 15 N.Y.2d 97, 256 N.Y.S.2d 129 (1956).

In the final analysis the nature and scope of the test to be applied to determine the question at bar must be derived from the decisional law of the New York courts. A reading and careful analysis of the more recent state court cases on the issue of "doing business" conclusively indicate that those courts measured the presence of a foreign corporation by evaluating *every* forum contact in light of the *nature* of the corporation and its business objectives. *Delagi* v. *Volkswagenwerk A.G. of Wolfsburg*, 29 N.Y.2d 426, 228 N.Y.S.2d 653 (1972); *Frummer* v. *Hilton Hotels International, Inc., supra; Taca International Airlines, S.A.* v. *Rolls Royce of England, Ltd., supra; Bryant* v. *Finnish National Airlines*, 15 N.Y.2d 426, 260 N.Y.S.2d 625 (1965); *Simonson* v. *International Bank*, 16 A.D.2d 55, 225 N.Y.S.2d 392 (1st Dept. 1962), *aff'd* 14 N.Y.2d 281, 251 N.Y.S.2d 433 (1964).

The New York courts have determined the issue of "doing business" by applying a simple and pragmatic approach to determine if the foreign corporation has minimum contacts sufficient to indicate corporate presence within this State. *Frummer* v. *Hilton International Inc., supra; Bryant* v. *Finnish National Airlines, supra.* This approach has been recognized and followed by the federal courts in New York. *E.g., Beja* v. *Jahangiri, supra.* By its very nature the "pragmatic" approach requires the court to consider all of the foreign corporation's contacts with New York, in their totality, to measure the collective effect of these contacts on corporate presence within this State. Contrary to this well established approach, the Dis-

trict Court below failed to discuss and appreciate the collective effect of the defendant's many contacts with New York. Mistakenly the District Court's analysis is confined to a decision of corporate presence on a contact by contact basis. Each significant connection with New York was considered as though standing alone in some vacuum-like fact pattern. Never did the District Court below assess the totality of the defendant's many contacts with New York to determine whether OEA had minimum contacts in this State.

Moreover, notwithstanding the decision below and the allegations presented by the defendant, there is no New York authority indicating that certain *i.e.* particular, contacts must exist in all cases before jurisdiction can be found. The only requirement under New York's simple and pragmatic approach is that the defendant has minimum contacts with this State on a regular, systematic and continual basis. *Frummer* v. *Hilton Hotels International, Inc., supra; Bryant* v. *Finnish National Airlines, supra; Simonson* v. *International Bank, supra.* Whether the defendant has or has not got an office, a subsidiary, employees or franchished representatives physically within this state, is not, standing alone, conclusive proof of corporate presence under New York law. *Sunrise Toyota Ltd.* v. *Toyota Motors Co.*, 55 F.R.D. 519 (S.D.N.Y. 1972); *Frummer* v. *Hilton Hotels International, Inc., supra.* Rather, the existence of any one or more of these typical contacts must be evaluated collectively in light of the particular nature of the corporate business. Thus, the requisite minimum contacts to establish jurisdiction under New York do vary depending on whether the subject defendant is a hotel corporation, airline, international banking organization or foreign auto manufacturer. *Compare Sunrise Toyota Ltd.* v. *Toyota Motors Co., supra,* with *Delagi* v. *Volkswagenwerk A.G. of Wolfsburg, supra.*

The defendant and its subsidiary, E.T., are primarily manufacturers for specialty items used in the defense contract industry. They do not sell a consumer-type product which for successful marketing might require a permanent sales office in this state to cover the New York market. The facts now known in this case clearly establish that the OEA corporate organization can and has saturated their New York defense contracting market without the necessity and expense of opening and maintaining a local sales office. Finally, even assuming *arguendo* that OEA's agreement with Cornhill Commercial Co. of New York City and the E.T. franchise agreements in New York to market jetaxe are not by themselves sufficient to establish the requisite minimum contacts for jurisdiction, the District Court's restricted view of these contacts was error. The Cornhill and jetaxe agreements should not have been viewed in isolation. Rather, these agreements should have been recognized as additional manifestations of the OEA corporate design to employ New York contacts for its own financial benefit.

The District Court's and the defendant's weighty reliance on the recent case of *Delagi* v. *Volkswagenwerk A.G. of Wolfsburg, supra,* is misplaced. The decision in *Delagi* does not alter or modify the well established pragmatic test for "doing business" in New York. Indeed, a careful reading of *Delagi* supports the plaintiff's claim of error below that the Court failed to assess the totality of contacts.

In *Delagi,* the defendant, VWAG, a German corporation, manufactured and sold automobiles. VWAG had no office or place of business in New York. VWAG exported its products to the United States and sold them to Volkswagen of America, Inc. ("VWoA") a New Jersey corporation which was a wholly owned subsidiary of VWAG. VWoA similarly had no office or place of business in this State. After the cars arrived in America, they were resold

by VWoA to franchised wholesale distributors. In New York, the franchised distributor was World-Wide Volkswagen Corp. ("World-Wide"), the entire stock of which was owned and controlled by domestic investors totally unrelated to VWoA or VWAG. Based on these facts, the plaintiff in *Delagi* argued that the "relationship" between the distributor, World-Wide, and the manufacturer VWAG was sufficient to create *in personam* jurisdiction over the German manufacturing corporation. Needless to say, the plaintiff's use of the word "relationship" in the context of the facts in *Delagari,* was meaningless. There was clearly no direct relationship between the New York distributor and the German Corporation. The relationship had by the New York distributor was only with VWoA the subsidiary of VWAG. Thus, the Court held plaintiff had failed to establish the requisite minimum contacts to sustain jurisdiction over VWAG.

A recent case subsequent to *Delagi, supra,* which considered the issue of "doing business" in New York, clearly indicates that the *Delagi* decision is confined to the particular facts presented therein. *Sunrise Toyota Ltd.* v. *Toyota Motors Co., supra.* In *Sunrise Toyota, supra,* the District Court sustained jurisdiction over the foreign corporations even though neither the parent corporation nor the subsidiaries had offices in New York and were not "one and the same corporation." *Sunrise Toyota, Ltd.* v. *Toyota Motors Co., supra,* at 529. Contrary to the decision below in the case at bar, the Court in *Sunrise Toyota, Ltd., supra,* considered all of the several "indirect" contacts in their totality to measure corporate presence in New York. In *Sunrise Toyota, Ltd., supra,* the Court was not constrained to try and fit the facts in that case into some stereotyped pattern. Rather, it followed earlier precedent which considered the issue of "doing business" realistically, and in light of the commercial actuality of the particular facts. *Sunrise Toyota, Ltd., supra,* at 523. Had such a

pragmatic approach been taken by the Court below, there would be no doubt that the totality of the defendant's corporate contacts with New York are sufficient to establish presence within this State.

CONCLUSION

The plaintiff respectfully submits that the dismissal below should be reversed and the motion denied. The cumulative corporate activities of OEA, Inc. in New York, when viewed as a whole, are sufficient to establish corporate presence within this State.

Respectfully submitted,

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Services of three (3) copies of
the within brief is
hereby admitted this 28th day
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